Filed 8/25/04 Marriage of McBeth CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re the Marriage of MOSE L. and NENA P. MCBETH.	
MOSE L. McBETH, **Appellant,** **v.** **NENA P. McBETH,** **Appellant.**	**A103658** **(Solano County Super. Ct. No. SF110938)**

Mose L. McBeth (Husband) appeals from that portion of a judgment upholding the validity of a deed by which he deeded a house that was his separate property to himself and Nena P. McBeth (Wife) as husband and wife. His principal contention is that Wife is not entitled to any interest in the house because she breached her spousal fiduciary duty in securing an interest thereto. In a protective crossappeal, Wife appeals from that portion of the judgment that denies her a community interest in Husband's military pension.

We conclude the judgment is interlocutory and not appealable, and therefore both appeal and crossappeal must be dismissed. Nevertheless, we reach the merits of Husband's appeal by construing it as a petition for writ of extraordinary writ, which we deny.

BACKGROUND

The parties married on June 16, 1976. At the time Husband was on active duty in the United States Air Force. In 1989 he retired from the Air Force and began receiving a military pension.

Wife filed a petition for dissolution of the marriage on October 16, 1990. The petition identified the parties' date of separation as May 20, 1990, and listed a single family house in Vacaville as a community asset. On November 8, 1990, Husband was ordered to pay Wife monthly temporary spousal support of $242.

The March 1991 Deed

On March 28, 1991, the parties stipulated that Husband would be awarded the existing contents of the house as his sole and separate property. In exchange, Husband would make the monthly payments on Wife's car, without right to reimbursement until such time as he paid her $28,000, her agreed upon share of the equity in the house. When Wife received the $28,000, she would transfer title of the house to Husband and pay the existing balance due on the car.

On the same day, March 28, 1991, the parties executed an interspousal transfer grant deed, whereby, as husband and wife, they granted the house to Husband, "a married man, as his sole and separate property." The deed states that Wife gives the deed "to divest [herself] of any possible interest community or otherwise." Husband paid Wife the $28,000 after obtaining a loan that was secured with a deed of trust on the house.

The June 1993 Deed

On June 26, 1993, Husband, "a married man, as his sole and separate property," executed a grant deed granting the house to the parties, "husband and wife as joint tenants." As elaborated under "Trial," page 5 *post*, the parties disputed the purpose of the June 1993 deed.

Subsequent Proceedings

There was no further activity in the dissolution proceedings until November 2000, when Wife filed a substitution of attorney.

In November 2000 Wife sought to amend her original petition to allege a separation date of May 15, 1996. She also sought spousal support and payment of her share of Husband's military retirement.

On February 14, 2001, the trial court, pursuant to the parties' stipulation, allowed Wife to amend her dissolution petition to allege a separation date of May 15, 1996, without prejudice to Husband to allege a different date. It found that Wife's interest in Husband's military retirement was 25.2 percent, and accordingly ordered him to pay her $475 per month, beginning February 2001. The court reserved jurisdiction to determine the amount of military retirement due Wife for the period prior to February 2001. Pursuant to Wife's consent, it awarded temporary spousal support of $600, with the order to be effective December 5, 2000. It ordered husband to begin the spousal support payments in February 2001, and reserved jurisdiction to determining the amount and manner of paying the "resulting arrears."

In an August 2002 discovery motion, Wife argued that she had a community interest in the house because the parties were still married in June 1993 when the community "acquired" the house via the June 1993 grant deed. Husband rebutted that no community interest attached because the reconveyance was postseparation, and the parties were "no more than joint tenants." The parties agreed to submit the issue to the trial court as one of law.

In a December 30, 2002 ruling on the issue, the trial court concluded, as a matter of law under the facts as presented by the parties, that the parties shared a joint tenancy interest in the house, not a community property interest. It based its conclusion on the fact that the parties were living separate and apart in June 1993 when Husband reconveyed the property to himself and Wife. Its ruling further stated that because there might be disputed facts raised at trial as to the date of separation, or the source of the buy-out monies, the parties were not foreclosed from asserting a characterization issue as to the house.

Trial

Trial took place on January 8 and 9 and February 25, 2003. At the outset of trial, the parties stipulated that Wife was entitled to 25.2 percent of Husband's military pension. They also stipulated to the expert appraiser's valuation of the house as $145,000 as of June 29, 1993, and $250,000 as of December 15, 2002.

As issues to be resolved at trial, Wife identified, inter alia, the date of the parties' separation, the characterization of the house, permanent spousal support, military pension payment arrearages, and attorney fees. She asserted the house was a community asset, but, if not, she was entitled to a half interest in the house as a joint tenant, under the June 1993 deed. Husband asserted that he had a 100 percent interest in the house because (a) he "paid her off" in 1991, and (b) the June 1993 deed did not create any interest in the house in Wife because the deed was "without consideration" and was "cancelable as an ineffective testamentary disposition." He also asserted there was no reconciliation after the May 1990 separation.

Husband testified that he reconveyed the house to himself and Wife in June 1993 because he was then working temporarily in Oregon; there had been a "bad fire season" the previous year and the house had a shake roof; he needed someone to look after the house; he had no relatives or close friends in the area; and Wife, who did not live in the house, was the only person he trusted to look after it while he was away. He also intended by the reconveyance that Wife would inherit the house because he "don't have nobody," and, having "brought her all the way from the Philippines," he felt responsible for her and wanted her to have the house to fall back on if something happened to him.[1] He also testified that Wife's only stay in the house after their May 1990 separation was two weeks in 1993 while she was in the midst of moving from one apartment to another.

[1] Husband acknowledged that, as a retiree, he was entitled to free services from the Air Force legal office, and that the services included preparation of wills and powers of attorney. He explained that he did not seek such services regarding the house because, knowing the military structure, he would be at the bottom of the list as a retiree. He also explained he did not discuss the June 1993 grant deed with a lawyer or financial advisor because he was "in a hurry" at the time to "get it done," insofar as he was then working in Oregon and returned to Vacaville only every other weekend.

Wife testified that the June 1993 grant deed was executed as part of the parties' efforts to reconcile their marriage. She also testified she lived at the house from May 1993 until May 1995.

By the conclusion of trial, the court had announced the following findings:

1. The parties separated on May 20, 1990, and did not reconcile thereafter.

2. As to the military pension, Wife was not entitled to military pension arrearages, but she was entitled to receive 25.2 percent of Husband's military pension beginning February 14, 2001.

3. As to the house, it was not community property, but the June 1993 deed created a joint tenancy, vesting each party with an undivided half interest therein. Therefore, the court observed, "the only limitation on [Wife's] ownership interest is that she can be made to contribute to any maintenance cost, repair costs, taxes, insurance payments, interest payments and whatever else that counsel may come up with." The court acknowledged it was unsure how to treat mortgage payments in this context of contributions, and it also acknowledged that Wife could be entitled to an offset for Husband's exclusive use of the house.

4. As to spousal support, Husband was in arrears on spousal support from sometime in 1999 to February 2001.

The court reserved jurisdiction on the issue of permanent spousal support. It reserved jurisdiction on attorney fees until it could "see what form, how shall I put it, not an equalization payment but the equivalent of an equalization payment because of this joint tenancy partition now." It stated it would issue, as requested, a statement of decision, and it asked Wife's attorney to prepare a judgment on reserved issues. It ordered the parties to the calendar clerk for the setting of a settlement conference in 60 days regarding the determination of expenses on the joint tenancy ownership of the house. Such a settlement conference was duly scheduled for May 2, 2003.

Statement of Decision

On March 20, 2003, the court issued its statement of decision, incorporating the findings it announced during trial. The statement of decision's concluding sentence

states: "The court reserves jurisdiction over the issue of attorney's fees and costs until the conclusion of the case."

Judgment

On May 2, 2003, the court executed a judgment of dissolution, terminating the parties' marriage as of January 9, 2003. It also executed a "Judgment on Reserved Issues." This judgment reiterated that the house was not a community asset; the June 1993 deed created a joint tenancy, vesting each party with an undivided half interest in the house; Wife had a 25.2 percent community interest in Husband's military pension; and Wife was not entitled to any military retirement arrearages between May 1990 and March 2001. It also stated:

"4. The parties are directed to meet and confer regarding what, if any, credits or deductions may be taken by either of the parties in determining the parties' respective interests in the residence. The matter is set for settlement conference at 8:30 AM on May 2, 2003 in this department.

"5. The court finds that [Husband] ceased paying [Wife] court-ordered temporary spousal support some time in 1999, and did not pay any such support from that time until a new temporary spousal support order went into effect on March 1, 2001. The court directs the parties to meet and confer regarding calculation of the temporary spousal support arrearages owed by [Husband] to [Wife].

[¶]

"7. The court terminates the existing temporary spousal support order and reserves on the issue of permanent spousal support[.]

[¶]

"9. The court reserves on the issue of attorneys fees until the matter of separation of the parties' joint tenancy ownership of the residence is resolved."

The appellate record contains no information regarding the outcome of the scheduled May 2, 2003 settlement conference on credits/setoffs regarding the house.

Entry of Judgment

The May 2, 2003 judgments were entered on July 15, 2003. Husband appealed the portion of the judgment "upholding the validity" of the June 1993 deed and "refusing to issue an order canceling the aforementioned deed." Wife filed a protective crossappeal.

DISCUSSION

I. *Appealability*

Wife contends Husband's appeal is not ripe because the May 2, 2003 judgment did not dispose of all outstanding issues. She cites particularly to the judgment's reference to the determination of spousal support arrearages, credits/setoffs to which each party is entitled with respect to their interest in the house, and attorney fees. We note the court also reserved jurisdiction on the issue of permanent spousal support.

Appeals may be taken only from final judgments, not interlocutory judgments. (Code Civ. Proc., § 904.1, subd. (a)(1).) The substance and effect of the decree, not its form or caption, are determinative of finality. (*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 963.) In general, a judgment is deemed final for purposes of appeal "'where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree . . . .'" (*Ibid*.) In other words, the judgment is final when it decides the parties' rights and duties and effectively terminates the litigation. However, "where anything further in the nature of judicial action on the part of the court is essential to a final determination of the right of the parties, the decree is interlocutory," and thus not appealable. (*Olson v. Cory* (1983) 35 Cal.3d 390, 399.)

We agree that the judgment is not final for appellate purposes. The principal dispute between the parties was their ownership interest in the house. Although the court found that the parties were joint tenants, its decision anticipated a further order allocating the value of the house to each party after determining their rights to contributions and setoffs. The status of the parties' proceeding resembles the circumstance in *In re Marriage of Ellis* (2002) 101 Cal.App.4th 400, in which the husband appealed from an order finding a community interest in a medical subsidy available to him on his retirement. *Ellis* concluded the order was interlocutory because it anticipated a final

order evaluating and dividing this community asset and dismissed his appeal. (*Id*. at p. 403.)

Additionally, the judgment here anticipated an order determining the amount of temporary spousal support arrearages due Wife and her entitlement to permanent support. Furthermore, the special statutory procedure that permits an interlocutory appeal when issues in a dissolution proceeding have been bifurcated (Fam. Code, § 2025; Cal. Rules of Court, rule 1269.5) was not followed here.

For all these reasons we conclude the judgment was interlocutory in nature, obligating us to dismiss the appeal. (*In re Marriage of Doherty* (2002) 103 Cal.App.4th 895, 898.) Nevertheless, in the interest of judicial economy and bringing this protracted case to an end, we exercise our discretion to treat the appeal as a petition for extraordinary writ within our original jurisdiction. (See *In re Marriage of Ellis, supra*, 101 Cal.App.4th at p. 404.) Insofar as Husband's purported appeal concerns the parties' ownership interest in the house, and resolution of this issue is a prerequisite to any allocation of the value of the house, it is prudent to resolve his contention now.

II. *Ownership Interest Pursuant to June 1993 Grant Deed*

Husband's contention, as we understand it, is that the trial court erred in awarding any ownership interest in the house to Wife because she breached her fiduciary duty by securing, via the June 1993 grant deed, an interest in property that had previously been divided by stipulation and distributed to him. Furthermore, he argues, she failed to meet her burden of demonstrating that the June 1993 deed creating the joint tenancy was not the result of her undue influence.

Husband did not assert this argument to the trial court, and ordinarily we would therefore decline to address it in a writ proceeding, just as we would decline to address a new issue raised for the first time in an appeal. (See *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 374, fn. 6; *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 372; *In re Riva M*. (1991) 235 Cal.App.3d 403, 411-412.) Because we may readily resolve his argument, we do so, again for purposes of judicial economy.

Spouses are subject to the general rules governing the fiduciary relationship between people who also share a confidential relationship. (Fam. Code,[2] § 721, subd. (b).) To that end, they have a duty of good faith and fair dealing toward each other and shall not take advantage of the other. (§ 721, subd. (b).) From the date of separation to the date a particular community asset is distributed, each spouse remains subject to the standards of section 721 as to all activities that affect the assets of the other spouse. (§ 2102, subd. (b).) From the date a valid, enforceable, and binding resolution of the disposition of the particular asset is reached until the asset has actually been distributed, spouses also remain subject to the section 721 standards as to all activities that affect the asset of another spouse. (§ 2102, subd. (b).) However, once a particular asset has been distributed, the duties and standards of section 721 cease as to that asset. (§ 2102, subd. (b).)

Here, the court found that the parties separated permanently on May 20, 1990. At the time of their separation they had a community asset, a house. Thus, under sections 721, subdivision (b) and 2102, they had a postseparation fiduciary duty to each other regarding the house until such time as the house was actually distributed. On March 28, 1991, they agreed that the house would be distributed to Husband in exchange for his payment of $28,000 to Wife, and on the same day it was actually distributed to him via their execution of the interspousal transfer grant deed that transferred the house to him as his sole and separate property. Husband has never challenged the validity of this agreement or transfer. As a consequence, the parties' statutory fiduciary duty to each other concerning the house ended on March 28, 1991. Wife cannot thereafter be deemed to have violated her duty under section 721, subdivision (b), as to the house, when the parties were separated on the date of this asset's March 28, 1991 distribution and remained in "separated" status thereafter.

Husband now asserts that there was evidence the parties were not living separate and apart, i.e., had not arrived at a complete and final break in their marital relationship, (see *In re Marriage of Von Der Nuell* (1994) 23 Cal.App.4th 730, 734) when he executed

[2] All further section references are to the Family Code.

the June 1993 deed reconveying the house to himself and Wife. Not only was there substantial evidence by which the court could find the parties separated permanently in May 1990, Husband's present assertion directly contradicts his position at trial. At the outset of trial his attorney stated there would be evidence that there was no reconciliation, and Wife did not live in the house after the May 1990 separation date listed in the original dissolution petition. During trial, after the court had asked Husband a series of questions to ascertain the accurate date of the parties' separation, he replied, "Ma'am, when me and Mrs. McBeth separated, we separated. She came back to our home during that two-week period [in 1993, between moving from one apartment to another], and . . . that was it." Given the theory on which he presented his argument on the separation date at trial, he is estopped from now asserting a different date of separation. (See *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.)

Husband relies on *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996 and *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 287, to support his argument that Wife had the burden of demonstrating the June 1993 grant deed was not the result of her undue influence, and she failed to do so. *Delaney* and *Haines* hold that when an interspousal property transfer gives an advantage to one spouse to the disadvantage of the other, there is a presumption, under the fiduciary duties imposed by section 721, that the transaction was the result of undue influence, which the advantaged spouse has the burden of rebutting. (*Delaney, supra,* 111 Cal.App.4th at p. 999; *Haines, supra*, 33 Cal.App.4th at pp. 286-294, 301.)

These cases are inapposite because they both concern property transfers that occurred before any severance of the marital relationship. Here, as discussed, the parties were no longer subject to the standards of section 721 regarding the house at the time of the June 1993 grant deed because they were separated in March 1991 when this community asset was distributed to Husband, and they never subsequently reconciled. In any case, Husband's own undisputed evidence rebuts any presumption of Wife's undue influence regarding the June 1993 deed. As he testified, the making of the deed was at his initiation and for his benefit: to have someone watch over the house while he was

away. He also initiated the deed out of a sense of responsibility to Wife, to assure she would be provided for if something happened to him, and there was no evidence to suggest that Wife ever deceived, badgered, or threatened him into making the deed when he was vulnerable to such behavior. (Compare *Delaney, supra*, 111 Cal.App.4th at p. 994: one spouse had superior legal training and prior experience with interspousal transfer and other spouse had learning disability and limited reading comprehension; *Haines, supra*, 33 Cal.App 4th at p. 284: transfer occurred at time of emotionally-charged conversations, physical confrontations.) Any issue of undue influence was dispelled by Husband's testimony.

DISPOSITION

Husband's appeal and Wife's protective crossappeal are dismissed. The petition for extraordinary writ is denied. Wife is awarded costs.

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Jones, P.J.

We concur:

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Stevens, J.

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Simons, J.